No. 79-1263

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1979

WILLIAM E. JAHODA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD E. GORMAN
53 W. Jackson Blvd.
Chicago, Illinois 60606

Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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OCTOBER TERM 1979

NO.

WILLIAM E. JAHODA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, William E. Jahoda, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The unpublished Per Curium Order of the Court of Appeals is printed in the Appendix to this Petition (App. A. p. App. 1).

JURISDICTION

The decision of the Court of Appeals was filed on January 9, 1980. Petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 28, 1980, a copy of which order is printed in the Appendix to this Petition (App. B p. App. 3). This Petition is filed within 30 days of January 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendant was deprived of his constitutional right to a Grand Jury Indictment, as guaranteed in the Fifth Amendment to the Constitution of the United States that in a federal criminal case no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, by the action of the District Court, sustained by the Court of Appeals herein, in finding that the Government did not have to prove that the defendant operated a gambling business and failed to disclose on his income tax return the gross wages received as the source of undisclosed income charged by the Grand Jury in the Indictment?

2. Whether the action of the District Court as affirmed by the Court of Appeals as stated in Question 1 herein, in a prosecution brought under the Internal Revenue Code of 1954, §7206(1) (Fraud and False Statements) is a constitutionally impermissible amendment of the indictment and in conflict with the rulings of this Court in *Ex Parte Bain,* 7 S.Ct. 781?

3. Whether the Court of Appeals ruling in its Per Curium Order herein, that the variance, if any, between the indictment and proof presented at trial as to the source of additional income was not prejudicial, is in conflict with

the ruling of this Court in *Stirone* v. *United States,* 80 S.Ct. 270, 273?

4. Whether the Court of Appeals' decision in an important question of federal law sanctioned such a departure from the usual and accepted course of judicial proceedings by a lower court, in finding a non-prejudicial variance, as to call for an exercise of this Court's power of supervision, *Dunn* v. *United States,* 99 S.Ct. 2190, 2193?

Constitutional and Statutory Provisions Involved

The Constitution of the United States:

"AMENDMENT V—

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

"AMENDMENT VI—

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 26, United States Code:

"7206. *Fraud and false statements*

"Any person who—

"1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . ."
"shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852."

"§ 7201. *Attempt to evade or defeat tax*

'Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.'

Federal Rules of Criminal Procedure:

"*Rule 7. The Indictment and the Information*

"*(a) Use of Indictment or Information.* An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

"*(b) Waiver of Indictment.* An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

"*(c) Nature and Contents*

"(1) *In General.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. . . .

"*(d) Surplusage.* The court, on motion of the defendant may strike surplusage from the indictment or information.

"*Notes of Advisory Committee on Rules*

"*Note to Subdivision (d).* This rule introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial. The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in the light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended. Ex parte Bain, 7 S.Ct. 781, 121 U.S. 1, 30 L.Ed. 849."

Rule 23, Trial by Jury or by the Court:

"(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

"As amended Apr. 26, 1976, eff. Oct. 1, 1977; Publ.L. 95-78, §2(b), July 30, 1977, 91 Stat. 320."

STATEMENT OF THE CASE

This case began with the filing, on September 27, 1978, of a one count indictment (No. 78 CR 656) (App. C), charging the Petitioner, William E. Jahoda with a violation of Section 7206(1), Title 26, U.S.C., which in its charging part reads as follows:

"THE SPECIAL SEPTEMBER 1978 GRAND JURY CHARGES:

"That on or about the 15th day of April, 1974, in the Northern District of Illinois, Eastern Division,

WILLIAM E. JAHODA,

of Forest Park, Illinois, did willfully and knowingly make, subscribe and cause to be made and subscribed a document verified by a written declaration that it was made under penalties of perjury, to wit: a United States Individual Income Tax Return Form 1040, for the calendar year 1973, which was filed with the Internal Revenue Service in the names of William E. and Shirley L. Jahoda, and which said return he did not believe to be true and accurate as to every material matter, in that said return reported income from wages, interest and rental property.

"WHEREAS, as he then and there well knew and believed, he had substantial income in addition to that heretofore stated; and he then and there well knew

and believed that he operated a gambling business and failed to disclose on said return the gross wages received, expenses incurred or other information relative to this business.

"In violation of Title 26, United States Code, Section 7206(1).

"A TRUE BILL:"

The Petitioner plead not guilty to this offense.

A Motion to Dismiss the Indictment for vagueness, indefiniteness and insufficiency (App. D) was denied (App. E).

A Motion by the Government after indictment that the Petitioner furnish exemplars of his handwriting for comparison with his signature on documents sought to be introduced as evidence was allowed over objection and is not raised as a part of this Petition.

The trial of the case proceeded before the Honorable Stanley J. Roszkowski, sitting without a jury on May 4, 1979. Testimony was heard for the Government. The Petitioner did not testify and both sides rested. Arguments were had and the Petitioners Motion for Judgment of Acquittal was taken under advisement. A motion was made by Petitioner that pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure and before a general finding in the case that the Court find the facts specially.

On May 22, 1979, the Court entered an Order finding the Petitioner guilty, to which was attached an Order of Special Findings (App. F. p. App. 10) which found among other things:

"(7) That despite the Defendant's contention that the Government did not prove that he operated a gambling business, the Government did prove beyond a reasonable doubt that he knew he had substantial in-

come in addition to the amount stated on the 1973 Form 1040. Therefore, the Government did prove a violation of 26 U.S.C. Section 7206(1) beyond a reasonable doubt, and we do not have to reach the issue of whether the Defendant operated a gambling business."

Petitioner's Post Trial Motion for Judgment of Acquittal was denied, and on June 26, 1979, he was sentenced to imprisonment for a term of two years.

STATEMENT OF FACTS

The Unpublished Per Curiam Order of the Court of Appeals made no finding of the pertinent facts.

The facts in the trial record are substantially as follows:

Five witnesses testified for the Government that they played various games of chance[1] with the Petitioner at various locations[2] in the suburban area of Chicago. That they gave the Petitioner checks made to cash which were endorsed by the Petitioner and deposited into various bank accounts maintained by the Petitioner and his wife, for their losses.

At the conclusion of the first witness's[3] testimony the government moved that the checks he identified be admitted into evidence, to which objection was made by the Petitioner on the grounds that they were immaterial and irrelevant as not being income from a gambling business or gross wages received therefrom, as charged in the indictment. On cross examination this witness and all other Gov-

[1] Gin rummy; a card game called In-Between-The-Sheets. Poker, liar's poker, ship, captain and crew.

[2] The witness's private club, an apartment, and various taverns.

[3] William Barr (R. 29).

ernment witnesses testified they never employed the Petitioner or paid him any wages. The trial court, *inter alia* before admitting the exhibits (R. 34) made the following statement:

> "The Court: The charge as I see it here is a simple income tax evasion, that he did not report certain income that he received."[4]

Four more witnesses testified substantially to the same effect as the first witness as to participating in various games of chance and the same objection was made to the relevancy and materiality of the exhibits offered during their testimony which consisted mainly of checks made to cash and endorsed by the Petitioner.

The Government moved for admission of all exhibits which were admitted over objection (R. 79).

The Government rested. The Petitioner did not testify or call any witnesses, but moved for dismissal on the ground that the evidence did not support the charge.

[4] Tax evasion was not charged, Sec. 7201, Title 26 U.S.C., which is an offense involving different elements of proof. Had the trial court instructed a jury in this manner it would have been error per se.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit on the following grounds:

1. The Court of Appeals has decided an important federal question in a way in conflict with applicable decisions of this Court and other Courts of Appeals.

In affirming the decision of the district court, the Court of Appeals has in effect sanctioned the action of the District Court in its findings (App. F, Para. 7).

> "That despite the Defendant's contention that the Government did not prove that he operated a gambling business, the Government did prove beyond a reasonable doubt that he knew he had substantial income in addition to the amount stated on the 1973 Form 1040. Therefore, the Government did prove a violation of 26 U.S.C. Section 7206(1) beyond a reasonable doubt, and we do not have to reach the issue of whether the Defendant operated a gambling business."

And (App. F, Para. 8):

> "By proving beyond a reasonable doubt that the defendant knew he had substantial income in addition to the amount stated on the 1973 Form 1040, the Government proved a prima facie case. Proof that the Defendant operated a gambling business is unnecessary, and we make no finding as to that allegation.

These findings are in error as constituting an impermissible amendment to the indictment.

The indictment, brought under Section 7206(1) of Title 26, U.S.C. charges perjury, by omission, of material facts on his income tax return.

> "7206. *Fraud and false statements*
>
> "Any person who—
>
> "(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . ."

The gist of the offense under this statute is the false statement.

It is contended that any fair reading of the charging part of the indictment (App. C) when the grand jury descended to informing the accused of the specific offense, coming under the general description with which he is charged (perjury, here by omission), that ". . . . he then and there well knew and believed he had substantial income in addition to that heretofore stated; and he then and there well knew and failed to disclose on said return the gross wages received. . . .", this was a material allegation as to the source of the income which under this statute had to be alleged and proved. It was to this indictment your Petitioner plead not guilty and by that plea put into issue every material matter in the charges. The Court of Appeals for the Fifth Circuit in *United States* v. *Carillo,* 561 F.2d 1125, 1127 (1977) held:

> "We noted that the government charged the defendants with filing a false return by failing to show income received. In order to demonstrate the receipt of the income, the government necessarily had to show the income's source."

The Court of Appeals for the Seventh Circuit in *United States* v. *DiVarco,* 484 F.2d 670 (CA. 7, 1963) sought to be distinguished by that Court in its Per Curiam Order affirming the District Court still is authority for the principal in that circuit, here argued by your Petitioner, at page 673.

"* * * The district court in a memorandum opinion, United States v. DiVarco, 343 F.Supp. 101 (N.D. Ill. 1972), concluded that the source of income was a material matter' and that the willful and knowing misstatement of the source of income was covered by the prohibition in §7206(1).

"We agree with and adopt Judge Will's opinion as to materiality. The plain language of the statute does not exclude the matter of the source of income from the definition of 'material matter.' In light of the need for accurate information concerning the source of income so that the Internal Revenue Service can police and verify the reporting of individuals and corporations, a misstatement as to the source of income is a material matter."

This Court in its prophetic and landmark case *Ex Parte Bain,* 7 S.Ct. 781 announced the rule that an amendment to the body of an indictment violates defendant's Fifth Amendment rights and renders a conviction based thereon void. This Court held that due to the amendment of the indictment the defendant was not tried on the indictment in *Bain,* supra, returned by the Grand Jury, as is his constitutional right, and that trial on the amended indictment is constitutionally repugnant because there is no way of knowing whether the grand jury would have returned the indictment as amended if they had been given the opportunity. This Court has never retreated from that mandate and has on the contrary reaffirmed its adherence, *Russell* v. *United States,* 82 S.Ct. 749, 768 and cases cited therein.

By affirming the District Court's finding the Court of Appeals is in conflict with the Court of Appeals for the Fifth Circuit which held in *United States* v. *Prejean,* 494 F.2d 495, 497, (5th Cir., 1974):

"The Fifth Amendment gives every indicted defendant the right to be tried only on the charges made by the grand jury that indicted him. If he is to be convicted, the conviction must rest solely on the charges made by the indictment. Neither the prosecution nor the trial judge can alter the charge to fit the proof; to do so would be usurping the function of the grand jury. Stirone v. United States, 1960, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252; United States v. Beard, 5th Cir., 1971, 436 F.2d 1084. See Ex Parte Bain, 1887, 212 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849."

No one could suppose that the prosecutor would be free to roam at large in proving the elements of the crime, so explicitly stated. That the action of the trial court constituted an impermissible amendment of the indictment was the principal argument raised by Petitioner in his appeal to the Seventh Circuit.

2. The Writ of Certiorari should issue because the Court of Appeals decision in an important question of federal law by a lower court in finding a non-prejudicial variance if any, between the indictment and proof at trial was insignificant, calls for an exercise of this Courts supervisory powers.

The holding that a non-prejudicial variance existed is bottomed on the Court of Appeals reliance that no impermissible amendment of the indictment existed. To do this, the Court of Appeals had to approve the trial court's findings (App. F, Para. 3). "That in fact the Defendant knowingly *received income from various sources* for 1973. . . ." and (App. F, Para. 8). "That it is not essential that everything in an indictment be proved. It is only necessary to prove so much thereof, as establishes, prima facie that there has been a violation of the statute involved."

Had the indictment charged in the language as adopted by the trial court in finding paragraph 3 "That the Defendant knowingly received income from various sources. . . ." it would have been vulnerable to the Motion to Dismiss (App. D) filed prior to trial for "vagueness, indefiniteness, and insufficiency" and "not charging an offense". The source of the alleged income not reported, of necessity, had to be charged as a material allegation so that the defendant could be informed as to the nature of the offense charged with sufficient clarity to enable him to prepare a defense, Rule 7(c) F.C.R.P.

The trial court here denied that Motion, (App. E) holding among other things ". . . . the indictment is a plain, concise and definite written statement of the offense charged. . . ." By the trial courts findings the indictment could not have been so plain and definite.

The trial court's finding that a prima facie case was proved is in error as it found in (App. F, para. 8) that a material allegation need not be proved.

This Court in its ruling in *Dunn* v. *United States*, 99 S.Ct. 2190 in similar circumstances as here, granted certiorari to an affirmance of a decision by the Tenth Circuit Court of Appeals and reversed because it disagreed with that Court's ultimate disposition construing a discrepancy as a non-prejudicial variance between the indictment and proof at trial.

This Court in *Dunn,* supra held that no variance existed, rather that the defendant was found guilty of an offense not charged. The analogy to the *Dunn* case and the Petitioner here is most compelling when this Court's reasoning and the Constitutional right of the Petitioner to Due Process guaranteed by the Sixth Amendment is considered, as stated at p. 2194 of that opinion.

> "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. (Citing cases)
>
> "There is to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. As we recognized in *Cole* v. *Arkansas,* supra, 333 U.S. at 201, 68 S.Ct., at 517, '[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

Is not the action of the Court of Appeals in referring to the "variance if any . . ." as "not prejudicial" in conflict with this Court's admonition in *Stirone* v. *United States,* 80 S.Ct. 270 (1960) 273:

> "While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."

and a reason for granting the Writ.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RICHARD E. GORMAN,
Attorney for the Petitioner
William E. Jahoda

53 West Jackson Boulevard
Chicago, Illinois 60604
(312) 922-3113

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued January 9, 1980)

January 9, 1980.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. John W. Peck, Senior Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

No. 79-1692

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM E. JAHODA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 78-CR-656

Stanley J. Roszkowski, Judge.

O R D E R

The Court, having read the briefs, addressed itself to the record, heard oral argument from both parties, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

There was ample evidence adduced at trial to support the defendant's conviction for violation of 26 U.S.C. § 7206(1) (false declarations under penalty of perjury). The variance, if any, between the indictment and the proof presented at trial regarding the source of his additional income was insignificant absent a showing of prejudice. In an effort to persuade us that the variance between proof of failure to disclose substantial gambling winnings and the charge of failure to disclose wages from a gambling business, defendant relied on a statement in *United States* v. *Di Varco*, 484 F.2d 670, 673 (7th Cir. 1973) that "a misstatement as to source of income is a material matter." *Di Varco* addressed a different point, and upheld a conviction under the same statute where the government proved a misstatement of source rather than amount of income. The case is not authority for the claim that any variance in the case at bar is fatal.

There was also no error in the district court's order that the defendant produce handwriting exemplars and those exemplars were properly introduced at trial for comparison purposes only. *United States* v. *Rogers*, 475 F.2d 821, 825 (7th Cir. 1973). The judgment of conviction is therefore AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 28, 1980
Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. JOHN W. PECK, Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, Circuit Judge

No. 79-1692

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM E. JAHODA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-656
STALEY J. ROSZKOWSKI, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for the defendant-appellant, all members of the original panel having voted to DENY a rehearing, and no judge in regular active service having requested a vote on the suggestion for rehearing *en banc*, accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* Senior Circuit Judge John W. Peck of the United States Court of Appeals for the Sixth Circuit is sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v.

WILLIAM E. JAHODA,

Defendant

No. 78 CR 656

Violation: Title 26, United States Code, Section 7206(1)

THE SPECIAL SEPTEMBER 1978 GRAND JURY CHARGES:

That on or about the 15th day of April, 1974, in the Northern District of Illinois, Eastern Division,

WILLIAM E. JAHODA,

of Forest Park, Illinois, did willfully and knowingly make, subscribe and cause to be made and subscribed a document verified by a written declaration that it was made under penalties of perjury, to wit: a United States Individual Income Tax Return Form 1040, for the calendar year 1973, which was filed with the Internal Revenue Service in the names of William E. and Shirley L. Jahoda, and which said return he did not believe to be true and accurate as to every material matter, in that said return reported income from wages, interest and rental property.

WHEREAS, as he then and there well knew and believed, he had substantial income in addition to that heretofore stated; and he then and there well knew and believed that he operated a gambling business and failed to disclose on said return the gross wages received, expenses incurred or other information relative to this business.

In violation of Title 26, United States Code, Section 7206(1).

A True Bill:

.....

FOREMAN

.....

UNITED STATES ATTORNEY
TJFLeischmann:mkc
353-5267

APPPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 CR 656

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

WILLIAM E. JAHODA,

Defendant.

MOTION TO DISMISS THE INDICTMENT

Now comes WILLIAM E. JAHODA, the Defendant herein, by his attorney, RICHARD E. GORMAN, and moves to dismiss the indictment herein for the following reasons:

1. That the said indictment fails to inform this Defendant of the nature and cause of the accusation with the certainty required by law.

2. That the said indictment fails to charge or aver the commission or omission of acts by this Defendant constituting any offense against any statute of the United States, with the certainty required by law.

3. That the said indictment is vague, indefinite, and uncertain, and, therefore, insufficient in that the said indictment does not sufficiently aver or charge the elements of the supposed crime or offense therein attempted to be charged, and it is impossible for this Defendant to prepare a defense thereto.

4. That the said indictment is vague, indefinite, and uncertain and, therefore, void, and violates Rule 7 of the Federal Rules of Criminal Procedure for the reason that it fails to set forth the essential facts constituting the offenses attempted to be charged.

5. That the allegations of the said indictment are so uncertain and indefinite that they violate the requirements of the Sixth Amendment to the Constitution of the United States.

6. That the allegations of the indictment have been fragmentized to multiply offenses and are pleaded in the disjunctive.

7. That the indictment is violative of the Sixth Amendment to the Constitution of the United States for failure to advise the Defendant of the nature and cause of the allegation against him since the allegation ". . . or other information related to his business", if allowed to stand, the government could satisfy its scope in any of an unlimited number of ways, and the Defendant has no opportunity to prepare a defense, nor be protected against double jeopardy.

8. That the indictment is insufficient in law.

9. That the indictment is insufficient in fact.

Respectfully submitted,

WILLIAM E. JAHODA

BY: *Richard E. Gorman*
RICHARD E. GORMAN,
his attorney.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 CR 656

UNITED STATES OF AMERICA

vs.

WILLIAM E. JAHODA

ORDER

Defendant's motion to dismiss the indictment is denied. Although there are no federal cases exactly on point, this court agrees with the following sentence and accompanying citations from 42 C.J.S. § 101 p. 985:

> "Where a statute, in defining an offense, uses the word 'or' in the sense of 'to-wit' that is, in explanation of what precedes, making it signify the same thing, the indictment may follow the words of the statute."

The phrase "or other information" used in the instant indictment does not refer to a separate offense or to a separate way an offense can be committed. Rather, the indictment is a "plain, concise, and definite written statement of the essential facts constituting the offense charged," in accordance with Rule 7 of the Federal Rules of Criminal Procedure.

The Government's motion for a court order directing the defendant to furnish exemplars of his handwriting is granted. The defendant is hereby ordered to furnish exemplars of his handwriting to the Government. Such a request is not unreasonable, and is not violative of any of the defendant's constitutional rights. *Gilbert* v. *California*, 388 U.S. 263, 266-67 (1967).

Government's motion for reciprocal discovery is granted.

Defendant's motion under Rule 16 is denied in part and granted in part: Paragraphs 1, 2, 3, 5 granted in that the Government has already complied or has stated they will comply with the request. Paragraphs 4, 6, 7, 8, 9, 10 denied.

Nothwithstanding this order, all *Brady* material is to be made available to the defendant. Additionally, all material covered by the Jencks Act, 18 U.S.C. 3500 is to be made available after a witness has testified on direct examination.

ENTER:

Stanley J. Roszkowski
Stanley J. Roszkowski, Judge
United States District Court

Dated: February 7, 1979

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 CR 656

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM E. JAHODA,

Defendant.

ORDER

This case was heard on May 4, 1979. Pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure, and after hearing all of the evidence and all of the arguments of counsel, this Court specially finds that:

(1) Defendant William E. Jahoda was charged with violating 26 U.S.C. Section 7206(1), in that he allegedly filed a United States Individual Income Tax Return Form 1040, for the calendar year 1973 which he did not believe to be true and accurate as to every material matter, in that he had substantial income in addition to that amount stated, and that he operated a gambling business and failed to disclose wages, expenses and other information relative to that business.

(2) That the Defendant jointly filed a United States Individual Income Tax Return Form 1040 with his wife, and reported that his total income for 1973 from wages, salaries and interest was $13,040.00.

(3) That in fact the Defendant knowingly received income from various sources for 1973 of approximately $110,000.00.

(4) That the Defendant signed his 1973 Form 1040 on April 15, 1974 and adopted the following statement by making his signature: "Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete."

(5) That this Court finds beyond a reasonable doubt that Defendant William E. Jahoda did not believe that his 1973 Form 1040 was true and correct as to every material matter, despite the fact that he swore that it was true and correct to the best of his knowledge.

(6) That 26 U.S.C. Section 7206(1) provides in relevant part that anyone who willfully makes and subscribes any return which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter shall be guilty of a felony.

(7) That despite the Defendant's contention that the Government did not prove that he operated a gambling business, the Government did prove beyond a reasonable doubt that he knew he had substantial income in addition to the amount stated on the 1973 Form 1040. Therefore, the Government did prove a violation of 26 U.S.C. Section 7206(1) beyond a reasonable doubt, and we do not have to reach the issue of whether the Defendant operated a gambling business.

(8) That it is not essential that everything in an indictment be proved. It is only necessary to prove so much thereof as establishes, *prima facie,* that there has been a violation of the statute involved. *United States* v. *Good Shield,* 544 F.2d 950, 953 (8th Cir. 1976); *United States* v. *Archer,* 455 F.2d 193, 194 (10th Cir.),*cert. denied,* 409 U.S.

856, 93 S.Ct. 135, 34 L.Ed.2d 100 (1972); *Gambell* v. *United States,* 276 F.2d 180 (6th Cir. 1960). By proving beyond a reasonable doubt that the defendant knew he had substantial income in addition to the amount stated on the 1973 Form 1040, the Government proved a *prima facie* case. Proof that the Defendant operated a gambling business is unnecessary, and we make no finding as to that allegation.

Accordingly, this Court finds that the Defendant William E. Jahoda is guilty of violating Title 26, United States Code Section 7206(1).

ENTER:

Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI,
JUDGE

DATED: May 22, 1979

Supreme Court, U. S.
FILED
APR 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1263

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM E. JAHODA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for filing a false income tax return on the ground that there was an impermissible amendment of the indictment or, in the alternative, on the ground that there was a prejudicial variance between the indictment and the proof.

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully making and subscribing a false income tax return for 1973, in violation of 26 U.S.C. 7206(1). The district court sentenced petitioner to two years' imprisonment, and the court of appeals affirmed (Pet. App. 1-2).

The indictment charged (Pet. App. 4-5) that petitioner signed, under penalties of perjury, a tax return for the 1973 calendar year that he did not believe was "true and accurate as to every material matter, in that said return reported income from wages, interest and rental property," when, in fact, petitioner "knew and believed * * * he had substantial income in addition to that" reported on his return and "knew and believed that he operated a gambling business and failed to disclose on [his] return the gross wages received, expenses incurred or other information relative to this business."

Petitioner's 1973 tax return reported income in the amount of $13,040 from wages, interest income, and rental income (Govt. Ex. 1). The evidence at trial established, however, that petitioner had won more than $100,000 in various games of chance in which he participated during 1973. Petitioner does not contest the lower court's findings that he willfully made and subscribed a tax return that substantially understated his income for 1973. Rather, he points out that the indictment alleged that he failed to disclose on his tax return gross wages received from a gambling business and that the proof at trial established that he failed to report gambling winnings. He contends that this difference between the proof and the indictment was an impermissible amendment of the charge in the indictment. Alternatively, he argues that there was a prejudicial variance between the indictment and the proof.

The decision below correctly held that there was no impermissible amendment of the indictment. There was no formal amendment of the indictment, and petitioner does not contend otherwise. Nor was there any constructive amendment of the indictment, which occurs only

when the proof at trial is of a different or additional crime than that alleged in the indictment. *United States* v. *Fruehauf Corp.*, 577 F. 2d 1038, 1055 (6th Cir.), cert. denied, 439 U.S. 953 (1978). The indictment here (Pet. App. 4-5) did not charge that petitioner's tax return was fraudulent because it falsified the source of his income.[1] Rather, it charged that petitioner's tax return was fraudulent because it falsified the amount of his income. The evidence presented by the government at trial proved that petitioner received substantial income beyond that which he reported on his 1973 tax return (Pet. App. 10), and thus established the crime charged in the indictment. That the source of the income was various "gambling activities" rather than a "gambling business" is irrelevant. It is only necessary to prove so much of an indictment as establishes, prima facie, that there has been a violation of the statute involved. *Gambill* v. *United States*, 276 F. 2d 180 (6th Cir. 1960).[2]

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[1] *United States* v. *DiVarco*, 484 F. 2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974), upon which petitioner relies (Pet. 11-12), is therefore distinguishable. In *DiVarco* it was charged that the tax returns at issue were fraudulent because they each falsely reported the source of the income.

Petitioner's reliance (Pet. 11) on *United States* v. *Carrillo*, 561 F. 2d 1125 (5th Cir. 1977), is also misplaced. *Carrillo* did not hold that the source of income is a material matter which must be proved. Instead, the court observed that where the government proves receipt of income, it necessarily proves, as a consequence, the source of that income (561 F. 2d at 1127).

[2] None of the cases relied upon by petitioner (Pet. 12-13) supports his claim that there was an impermissible amendment here. In *Ex parte Bain*, 121 U.S. 1 (1887), the trial court formally amended the indictment by striking language from it. *Russell* v. *United States*, 369 U.S. 749 (1962), involved a case where the indictment itself was invalid because it did not inform the defendant of the nature of the accusation against him. In *United States* v. *Prejean*, 494 F. 2d 495 (5th Cir. 1974), the defendant was convicted of a greater offense (burglary of a private residence at night) than that charged in the indictment (burglary).

At worst, there was merely a variance between the particulars alleged in the indictment and the proof. But a variance requires reversal only if it results in surprise that is prejudicial to the defendant's efforts to prepare his defense or otherwise affects his substantial rights. *United States* v. *Fruehauf Corp.*, *supra*, 577 F. 2d at 1057. Petitioner has never argued that he was unfairly surprised by the proof at trial, nor could he so contend. Prior to trial, petitioner stipulated to the disposition of checks given to him in payment of gambling losses (trial transcript 7; Stipulation IV), and he was therefore aware of the particulars of proof which the government intended to present at trial. Similarly, petitioner has not contended that any variance would preclude him from pleading the conviction in this case as a bar should the government ever seek in the future to prosecute him for filing a false tax return for the 1973 calendar year.

Contrary to petitioner's final argument (Pet. 14-15), the decision below does not conflict with either *Dunn* v. *United States*, 442 U.S. 100 (1979), or *Stirone* v. *United States*, 361 U.S. 212 (1960). *Dunn* simply held that the court of appeals erred in upholding a conviction on the basis of a charge that was neither alleged in the indictment nor presented to the jury at trial (see 442 U.S. at 106-107). In *Stirone* the indictment charged an interference with the importation of sand into Pennsylvania. There was proof at trial both of an interference with the importation of sand into Pennsylvania and of an interference with the exportation of steel out of Pennsylvania, and the jury was told that it could convict on either theory. Since interference with commerce was an essential element of the crime, proof as to interference with exportation constituted proof of a crime not charged in the indictment (361 U.S. at 218-219). Here, on the

other hand, petitioner was not charged with falsifying the source of his income, but rather with willfully understating the amount of his income in his tax return. The source of his income was therefore not an essential element of the crime charged.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

Supreme Court, U.S.
FILED
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No. 79-1263

In the Supreme Court of the United States

OCTOBER TERM 1979

WILLIAM E. JAHODA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

RICHARD E. GORMAN
53 West Jackson Boulevard
Chicago, Illinois 60604

Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

The respondent makes two points in its Answer praying the Court deny Certiorari:

1. It contends the indictment "charged that Petitioner's tax return was fraudulent because it falsified the amount of his income"—and—"It is only necessary to prove so much of an indictment as establishes, prima facie, that there is a violation of the statute involved" (Answer, p. 3).

It does not contend that any part of the indictment may be altered, thus it does not suggest substituting "various

sources'' for ''gambling business,'' though it concedes the former is what was proved and the latter what was charged. (idem.) Rather, it contends those parts of the indictment not proved be disregarded as surplusage.[1]

The test of this original, and convoluted, argument is its logical extension. More basically, the respondent shies from any demonstration of the accomplishment of its theory. It never brings itself to educate the Court, or the petitioner, at which of the several points of the indictment it can truncate without doing violence to the Fifth and Sixth Amendments.

We *think* the respondent's argument addresses itself to the last paragraph, and that the portion after the semicolon therein may be disregarded. Illustratively:

> ''WHEREAS, as he then and there well knew and believed, he had substantial income in addition to that heretofore stated; ~~and he then and there well knew and believed that he operated a gambling business and failed to disclose on said return the gross wages received, expenses incurred or other information relative to this business.~~'' (Striking above to conform to Respondent's argument).

We *believe* the Respondent is stating that these are particulars of the offense which need not be charged by the grand jury. Logically then, if these are the particulars on which the grand jury predicated its charge (but not necessary to the formal charge), and the defendant has been gratuitously supplied them, by the indictment, then he need not resort to Rule 7(f) of the Federal Rules of

[1] This novel theory rather frustrates the clear intent of Rule 7(e) of the Federal Rules of Criminal Procedure directing that surplusage may be stricken "on the motion of defendant," the theory ascribes a *sub silentio* rule to this Court that portions of an indictment may be declared "surplusage" and thus ignored (but not physically stricken) at the pleasure of the government.

Criminal Procedure. This logical extension leads to the incongruity that if particulars are furnished by order, the government is thus circumscribed in its proof; but if particulars are furnished by indictment, they may be disregarded, and the Bill of Particulars reaches an ascendency above the Bill of Rights.

2. The respondent contends that petitioner was not surprised at the proof at trial and ''he was . . . aware of the particulars of proof which the government intended to present at trial.'' (Respondent's Answer, p. 4).[2]

Assuming that contention can be validly predicated on the stipulations at trial,[3] that does not end the question. Knowing what proof the government intended to present, the petitioner could validly and successfully defend against the charges made. His infinite surprise was that his valid defense to the charge brought did not avert conviction.

[2] This contention is vacuous. The Court of Appeals for the Seventh Circuit raised the facade of such an issue by decision. The petitioner did not claim variance. He claimed failure of proof of the charges made.

[3] The respondent argues that petitioner agreed that he understated his income. This is factual error, and certainly cannot be based on the stipulations at trial. The stipulations made were "to eliminate the necessity of calling witnesses whose testimony would in large part be based upon business records, thereby eliminating foundation testimony, but specifically excepted "an objection based on the grounds of relevancy, and the defendant [petitioner] expressly reserved the right to interpose an objection to the admission into evidence of any of those stipulations and exhibits on the grounds of relevancy." This matter was amplified and agreed on prior to trial. (Tr. 3, 4) Objections were consistently made on the grounds of irrelevancy and immateriality.

CONCLUSION

The essence of the opinion of the Seventh Circuit we here pray this Court to review is a denigration of the Constitutional mandate that "no person shall be held to answer for a . . . infamous crime unless on . . . indictment . . ." and that, if indicted, he must "be informed of the nature and cause of the accusation; . . .", and of the many admonitions of this Court that the mandate must be revered.

We urge this high Court not be diverted from the basic essence of our prayer, by the facile manipulating of fact and issues by the respondent, and its fundamental contention that an accused need only be informed of the "nature" of the accusation, and that the prosecutor may elect the "cause."

It is recognized the Seventh Circuit has directed its opinion not be published, and the respondent's treatment of the issues has been cavalier, but the erosion of Constitutional guarantees are none the less—probably more—affected when they are screened.

We pray the Court grant its Writ of Certiorari, and bring the clear light of fundamental examination to the fundamental questions involved.

Respectfully submitted,

RICHARD E. GORMAN

Attorney for Petitioner